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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 76-1113 and 76-694

JOSEPH A. CALIFANO, Secretary of Health, Education & Welfare,

Appellant,

and

JAMES L. BUCKLEY *et al.* and ISABELLA M. PERICONE, Esq., as Guardian *Ad Litem,*

—vs.—

CORA MCRAE, *et al.,*

Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

CONSOLIDATED MOTION TO AFFIRM OR DISMISS APPEALS

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JAMES L. BUCKLEY et al and
ISABELLA M. PERNICONE, ESQ.,
as Guardian Ad Litem,
INTERVENOR-APPELLANTS,

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CORA McRAE, et al, PLAINTIFFS-
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CONSOLIDATED MOTION TO AFFIRM OR DISMISS APPEALS

Appellees, Cora McRae, Planned Parenthood of New York City, Inc. ("Planned Parenthood") and Irwin Teran, M.D., move to dismiss the appeals of the Secretary of Health, Education and Welfare (No. 76-1113) and of the Intervenor-Appellants

(No. 76-694) on the ground that no direct appeal to the Supreme Court is authorized. In the alternative, Appellees move for summary affirmance of the decision of the district court on the ground that Appellants present no federal question of sufficent substance to warrant review by this Court. Appellees also move to dismiss the appeal presented by Appellant-Intervenors on the ground that they never perfected an appeal to this Court.

JURISDICTION

Appellees contend this Court has no jurisdiction. The sole jurisdictional basis asserted by Appellants is 28 U.S.C. §1252, Govt. J.S. 1-2, Int. J.S. 4-5. This statute does not confer jurisdiction upon this Court to entertain a direct appeal when, as in this case, no Act of Congress has been held unconstitutional.

QUESTIONS PRESENTED

I. Whether this Court has direct appellate jurisdiction to hear this case under 28 U.S.C. §1252 when no act of Congress has been held unconstitutional.

II. Whether the previous decisions of this Court plainly support the findings of the court below that the Constitution prohibits discriminatory exclusion of abortion services from the entitlements created under Medicaid, and that poor women and physicians injured by this exclusion have standing to challenge it.

III. Whether this Court has jurisdiction to hear the claims of Intervenors who failed to perfect their appeal, lack standing, and raise no serious federal claims.

STATEMENT OF THE CASE

On September 30, 1976, Congress enacted Section 209 of Pub. L. 94-439, also known as the Hyde Amendment, which provides that none of the funds contained in the Departments of Labor, Health, Education and Welfare Appropriations Act, 1977, may be used "to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."

On October 1, 1976, the day the cutoff of funds became effective, Appellees filed this Civil Action in the United States District Court for the Eastern District of New York, seeking temporary, preliminary and permanent injunctive relief against the enforcement of the Hyde Amendment. The district court (Dooling, J.) granted a temporary restraining order on October 1, 1976, which was continued by consent, while the parties briefed the motion for a preliminary injunction.

While the temporary restraining order was in effect, Appellees moved, pursuant to Rule 65(a)(2), Fed. R. Civ. P., to consolidate the preliminary and permanent injunctions to permit the court to render a final determination holding the Hyde Amendment unconstitutional. The government opposed that motion. On October 18, 1976 the district court denied the motion in open court.

On October 19, 1976, the district court permitted the intervention of legislators James Buckley, Jesse Helms and Henry Hyde, and Isabella Pernicone who purports to represent the interests of embryos and fetuses.

The district court issued a preliminary injunction enjoining the government from enforcing the Hyde Amendment on October 22, 1976. The district court found that plaintiffs had established "the probability that [they] will prevail on the ultimate issue of merit," Govt. J.S. App. 19a and that "the apprehension of the providers is substantial, and the risk to the women seeking abortions is real. The harms are peculiarly irreparable in kind," Govt. J.S. App. 21a.

The district court's preliminary injunction is the subject of this appeal.

ARGUMENT

I. 28 U.S.C.§1252 DOES NOT AUTHORIZE DIRECT APPEAL TO THE SUPREME COURT FROM THE JUDGMENT THE DISTRICT COURT ENTERED IN THIS CASE.

Appellants, citing McLucas v. De Champlain, 421 U.S. 21, 31-32 and Weinberger v. Salfi, 422 U.S. 749, 763, n. 8, assert 28 U.S.C. §1252 as the sole basis of this Court's jurisdiction. Appellants' reliance on §1252 and the aforementioned cases is, however, misplaced and this Court is without jurisdiction to consider this appeal.

28 U.S.C. §1252 provides as follows:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any Court of the United States. . . holding an Act of Congress unconstitutional in any civil action, suit or proceeding to which the United States or any of its agencies, or

> any officer or employee thereof, as such officer or employee, is a party (emphasis supplied).

It explicitly conditions jurisdiction on the existence of a holding of unconstitutionality whether the holding be interlocutory or final. §1252 does not provide jurisdiction over an appeal where, as here, there has merely been a finding of probable success on the merits, or of probable unconstitutionality.

Neither McLucas nor Salfi provides support for §1252 jurisdiction to review preliminary injunctions where the challenged statute has not been held unconstitutional. Presumably, the paragraph in McLucas to which Appellants look is the following:

> It might be argued that, in deciding to issue the preliminary injunction, the District Court made only an interlocutory determination of appellee's probability of success on the merits and did not finally "hold" the article unconstitutional. By its terms, however, §1252 applies to interlocutory as well as final judgments, decrees and orders, and this Court previously has found the section properly invoked when the court below has made only an interlocutory determination of unconstitutionality, at least if, as here, that determination forms the necessary predicate to the grant or denial of preliminary equitable relief. Fleming v. Rhodes, 331 U.S. 100, 67 S. Ct. 1140, 91 L. Ed. 1368 (1947). In this case, as in the United States v. Raines, 362 U.S. 17,

20, 80 S. Ct. 519, 522, 4 L. Ed. 2d 524 (1960), it is clear that 'the basis of the decision below in fact was that the Act of Congress was unconstitutional. . .' Id. at 1371

The passage, however, does not support their position; to the contrary, it emphasizes the existence and necessity of a definitive holding as a predicate to §1252 jurisdiction.

Appellants ignore the difference between an "interlocutory determination of appellee's probability of success on the merits" and an "interlocutory determination of unconstitutionality." McLucas emphasizes that the latter is a holding of unconstitutionality for the purposes of §1252. In that case, the lower court did not simply determine probable unconstitutionality, but specifically and unequivocally held the statute unconstitutional. DeChamplain v. McLucas, 367 F. Supp. 1291, 1294 (D.D.C. 1973).[1] It was because of the holding below that this Court, in the last sentence quoted above, exercised its jurisdiction. It was likewise because of that holding that the Solicitor General asserted §1252 jurisdiction and that such jurisdiction was conceded by Appellee. (McLucas v. DeChamplain, Tr. pp. 5-6,17).[2]

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1. "The status of Article 134 is not uncertain at this time -- it is unconstitutional." Ibid.

2. There was absolutely nothing in the briefs or argument of McLucas which urged or addressed the question of whether §1252 could or should be expanded to include determinations of probable unconstitutionality.

Perhaps the peculiar posture in which McLucas reached this Court -- combining a definitive holding of unconstitutionality with only a preliminary injunction[3] -- explains Appellants' error in reading McLucas to extend §1252 jurisdiction to this case.

Weinberger v. Salfi, supra, which relies on McLucas, underscores the distinction between a holding and a finding of probable unconstitutionality as §1252 jurisdiction was stated explicitly to turn on the fact "that the court did hold a federal statute unconstitutional." Id. at 2466, n. 8 (emphasis supplied).

Jurisdiction cannot be manufactured here simply by characterizing, as does the Government, the district court's ruling as a "holding" (Govt. J.S. 1)[4]. In fact, the Government blocked Appellees' efforts to obtain such a holding of unconstitutionality. In response to Appellees' motion to

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3. Generally, a preliminary or interlocutory injunction is not predicated on a holding of unconstitutionality as in McLucas, but only, as here, on a finding of probable unconstitutionality. The holding generally attends the permanent injunction.

4. The Intervenors are a bit more circumspect. They argue that the decision below is within §1252 because the Secretary is "bound by the District Court's preliminary injunction based on the Court's view that §209 of Public Law 94-439 is unconstitutional." By contrast, McLucas uses the decisively different standard of "bound by a holding of unconstitutionality." supra 95 S.Ct. at 1373 (emphasis supplied).

consolidate the preliminary and permanent injunctions, the Government specifically opposed an ultimate determination on the merits of the constitutional issue and the district court refused to consolidate. It is not surprising, therefore, that the district court's Memorandum and Order granting the preliminary injunction repeatedly makes reference to the fact that it was merely adjudicating the probability of ultimate success. See e.g. Govt. J.S. App. 17a, 19a. In his second order concerning recoupment, the district judge stated explicitly that the preliminary injunction did not constitute a holding of unconstitutionality. "Because it was not the final judgment, the Memorandum did not explicitly hold that Section 209 was unconstitutional." (Govt. J.S. App. 29a). Appellants presumably rely on the court's following sentence that a finding of unconstitutionality is "implicit" in the granting of a preliminary injunction. However, as this Court clearly pointed out in McLucas, a finding of probable success on the merits, albeit one which implies that a statute is unconstitutional, is not the same as a holding on that issue, whether it be an interlocutory determination or a final one. Unless and until the holding is pronounced, this Court does not have jurisdiction pursuant to §1252.

The expansion of §1252 jurisdiction silently urged by Appellants here is unprecedented. Every reported case in which this Court exercised §1252 jurisdiction involved, like McLucas, a definitive holding of unconstitutionality. Cf. United States v. Christian Echoes National Ministry, Inc. 404 U.S. 561, 563-566; International Ladies Garment Workers'

Union v. Donnelly Garment Co., 304 U.S. 243. In the §1252 cases, the Court consistently reiterated that the existence of a holding below was the predicate to §1252 jurisdiction. Weinberger v. Salfi, 422 U.S. 749, 763, n. 8; Parker v. Levy, 417 U.S. 733, 741; Katzenbach v. McClung, 379 U.S. 294 295-296; McClung v. Katzenbach, 233 F.Supp. 815, 825 (N.D. Ala. 1964); Rusk v. Cort, 369 U.S. 367, 370 n. 4; Fleming v. Nestor, 363 U.S. 603, 604; United States v. Raines, 362 U.S. 17, 20; Reid v. Covert, 351 U.S. 487, 489, rev'd on other grounds 354 U.S. 1; Woods v. Miller Co., 333 U.S. 138, 139; Fleming v. Rhodes, 331 U.S. 100, See United States Supreme Court Transcript of Record, Vol. 152 (1946), p. 89; United States v. Hoy, 330 U.S. 724, 725; Bowles v. Willingham, 321 U.S. 503, 505; United States v. Royal Rock Coop, Inc., 307 U.S. 533, 541.

The crucial distinction between a "holding" and a finding of probable unconstitutionality, such as that made in this case, was also embedded in the original statutory scheme which conferred direct appellate jurisdiction over cases involving the constitutionality of federal statutes. In 1937, Congress enacted not one but two statutes providing for direct appeals: 50 Stat. 752, c. 754 Section 2, the precursor to §1252 which required "the decision [to be] against the constitutionality of the statute," and 50 Stat. 752-753 c. 754, Section 3, the precursor to §1253, which required only that an application for equitable relief restraining enforcement of a federal statute be adjudicated.

Grounded in the historic division between law and equity, "[T]he careful choice of language in the different sections of the act points clearly to distinction in categories." International Ladies Garment Workers' Union v. Donnelly Garment Co., 304 U.S. 243, 250. Accord-

ingly, for actions involving injunctive relief, §1252 provides an alternative to §1253 jurisdiction only where the statute is in fact held unconstitutional below. See Weinberger v. Salfi, supra; McLucas v. DeChamplain, supra; Fleming v. Nestor, 363 U.S. 603.

Until last year, this case would have been heard by a three-judge court pursuant to 28 U.S.C. §2282 and the preliminary injunction at issue would have been directly appealable under 28 U.S.C. §1253. When Congress enacted P.L. 94-381 and eliminated the three-judge requirement for cases such as this, it also eliminated the direct appellate Supreme Court jurisdiction, unless and until a holding of unconstitutionality is made.

Indeed, one of the paramount reasons for the Congressional repeal of the Three-Judge Court Acts was to relieve the Court of the obligation to hear this and like cases, thereby increasing its ability to control its caseload in accordance with the Chief Justice's recommendation:

> Direct appeal to the Supreme Court, without the benefit of intermediate review by a court of appeals, has seriously eroded the Supreme Court's power to control its workload, since appeals from three-judge district courts now account for one of five cases heard by the Supreme Court. The original reasons for establishing these special courts, whatever their validity at the time, no longer exist. There are adequate means to secure an expedited appeal to the Supreme Court if the circumstances genuinely require it.

> "Remarks of Warren E. Burger, Chief Justice of the United States, before American Bar Association, San Francisco, California," August 14, 1972, quoted in Sen. Rep. No. 94-204 (94th Cong., 1st Sess.).

In restricting the Three-Judge Court Acts, Congress unequivocally repudiated the need for a direct appeal to this Court as a means of safeguarding both the rights at stake in litigation seeking to restrain federal statutes as unconstitutional and the government's interest in preserving and enforcing its statutes.[5] Comp. McLucas v. DeChamplain, supra at 1372. To allow appeal here under §1252 would vitiate half the major purpose of repealing §2282. Indeed, in light of the legislative history of P.L. 94-381, §1252 itself is an anomaly. The Congressional will, as expressed in the shrinking of §1253 jurisdiction, stands against any expansion of §1252 jurisdiction, let alone the substantial and unprecedented expansion urged in this case.

II. APPELLANTS PRESENT NO FEDERAL QUESTIONS OF SUFFICIENT SUBSTANCE TO WARRANT REVIEW BY THIS COURT.

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5. Congress considered and rejected a special procedure which would have required this Court to give immediate attention to government certifications requesting expedited and direct appeal in the public interest. This proposal was rejected as unnecessary both because cases demanding immediate determination can be expedited at every level and because §1254(1) allows whichever party loses to petition for certiorari before judgment in the court of appeals. S. Rep., supra, pp. 10-11.

Appellants contend that the decision of the court below raises substantial questions both as to the plaintiffs' standing to sue and as to the finding that equal protection prohibits Congress from denying Medicaid services to poor pregnant women who choose abortion, while mandating such services for women who choose to carry pregnancy to term. Appellees respectfully submit that the previous decisions of this Court do not reasonably permit any decision other than that reached by the court below. No substantial federal questions are presented. The judgment of the district court should be summarily affirmed.

A. Under the decisions of this Court it is plain that Appellees, who were substantially injured by the enactment of the Hyde Amendment, have standing to challenge the constitutionality of the Amendment.

Appellants claim that the plaintiffs have not been injured and therefore lack the necessary standing to invoke the power of a federal court. Govt. J.S. 12; Int. J.S. 19-20. This claim is wholly refuted by uncontested affidavits filed by plaintiffs demonstrating that the Hyde Amendment threatened an imminent crisis for Medicaid-eligible indigent pregnant women seeking abortion services. Certified Medicaid providers, reasonably believing that the Amendment would effect a partial (the 50% federal share) or total denial of reimbursement for abortions, were refusing to schedule or perform scheduled abortions for Medicaid-eligible pregnant women.

Specifically, the affidavits establish (1) that Cora McRae, a Medicaid-eligible

pregnant woman, was denied an abortion she requested from Planned Parenthood of New York City, Inc., as a direct and immediate result of the enactment of the Hyde Amendment (McRae Affidavit, p. 1); (2) that Planned Parenthood refused to schedule or perform abortions under Medicaid because it could not afford to run the risk that subsequent payment for these abortions would not be forthcoming (Moran Affidavit, p. 2); (3) that Dr. Irwin B. Teran likewise refused to schedule or perform abortions because, as he averred, "I will not take the risk of anything less than guaranteed full reimbursement to which I as a certified Medicaid provider would be entitled but for the Hyde Amendment" (Teran Affidavit, p. 2); (4) that the financial risk was confirmed by the office of the New York State Commissioner of Social Services, which refused to guarantee full reimbursement for abortions in the event that the district court were not to issue the preliminary injunction (Moran Affidavit, p. 3).

The impact of the Hyde Amendment was demonstrated further by its effect on members of Ms. McRae's class. Two teenage women were treated for complications of illegal abortions which they obtained because they believed abortions were no longer available under Medicaid. For the same reason, other New York women sought pre-natal care at a city clinic (Lukomnik Affidavit, p. 2).

As stated by Judge Dooling in his Memorandum of October 22, 1976:

> It follows that withdrawal of reimbursement for elective abortions lawfully performed by licensed providers is directly injurious both

> to the providers and to the indigent women who seek the abortional ser- ices. The providers are denied payment, by the hand of the state, of what the government is (assuming their basic contention is constitutionally correct) obligated to pay them from the appropriation for carrying out Title XIX of the Social Security Act. The indigent women, the recipients of the medical assistance which it is the purpose of Title XIX to provide, have the interest of primary beneficiaries in the making of the payments, if their constitutional contention is correct. Govt. J.S. App. 10a.

In Singleton v. Wulff, U.S. , 49 L. Ed. 2d 826, this Court unanimously held that a physician who provided, and anticipated providing, abortions to welfare patients who were eligible for Medicaid payment had standing to challenge the Missouri statute which excluded abortions not "medically indicated" from Medicaid coverage. The Court said:

> A woman cannot safely secure an abortion without the aid of a physician, and an impecunious woman cannot easily secure an abortion without the physician's being paid by the State. The woman's exercise of her right to an abortion, whatever its dimension, is therefore necessarily at stake here. Id. 49 L. Ed. 2d at 836.

The Government's Jurisdictional Statement characterizes the plaintiffs' claim as being "only that enforcement of the challenged statute may lead some third

person, in this case the State of New York, to exercise a right in a manner contrary to their economic interest." Govt. J.S. 12-13. This ignores the reality demonstrated by the affidavits filed in the lower court. As summarized by Judge Dooling in his Memorandum of October 22:

> It is argued that plaintiffs are not now harmed, may never be harmed, if the state pays for the abortions, and, therefore, are not entitled to relief by preliminary injunction. But in fact the apprehension of the providers is substantial, and the risk to the women seeking abortions is real. The harms are peculiarly irreparable in kind. The federal funding and planning is critically important. It is idle to suggest that the withdrawal of federal support and the lead the federal government has sought to take will not result in renewed efforts by the states to deny the needed medical assistance in these cases. The two Central Services Unit, State of New Mexico, Memoranda (CSU-76-13, CSU MEMO 76-14) (attached to affidavit of Lewis Koplik sworn to October 15, 1976) illustrate the effect : on the enactment, the Unit announced that it would reimburse only for therapeutically necessary abortions; after restraining orders were entered, the Unit cancelled the first announcement and resumed reimbursement. The affidavit of Alfred F. Moran, sworn to October 15, 1976, shows that the office of the New York Commissioner of Social Services is not prepared to commit the Department to continued reimburse-

> ment if the federal payments are terminated. The affidavit of David Goldberg, sworn to October 15, 1976, is to the same effect. Without a continuance of the federal payments, it is clear that irreparable harm will be done to the indigent women involved. Govt. J.S. App. 21a-22a.

The Government argues that plaintiffs' standing is somehow dependent upon the outcome of two cases presently before this Court, Beal v. Doe, No. 75-554, and Maher v. Roe, No. 75-1440. We will not speculate about the outcome of those cases. It is clear, however, from the affidavits filed in the lower court and discussed by Judge Dooling in the passage quoted above that, whatever this Court decides in the state cases, the Hyde Amendment will continue to have substantial impact on the plaintiffs since the presence or absence of federal funding will inevitably influence state action.

In its Jurisdictional Statement, the Government cites a number of decisions of this Court which set forth certain standards for determining whether a plaintiff has standing to sue. Govt. J.S. 12-13. It is clear under these holdings that plaintiffs here have standing to challenge the Hyde Amendment.

A party seeking access to the federal courts must allege "such a personal stake in the outcome of the controversy as to assure" concrete adverseness. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 48 L. Ed. 2d 450, 460; Baker v. Carr, 369 U.S. 186, 204. In Simon, the Court held that the plaintiffs lacked standing to challenge a Revenue Ruling

allowing tax exemption to certain hospitals because they had failed to show any relationship between that ruling and the actions of the hospitals refusing them service. The Court found that:

> It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications. It is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services,

since the evidence was that the hospitals received a small portion of their income from tax deductible contributions and might well choose to forego the privilege of tax exemption, which they had every right to do. 48 L. Ed. 2d at 463.

The situation here is dramatically different. The injury to the plaintiff patients and providers flows directly and immediately from the enactment of the Hyde Amendment. By contrast, in Simon there was absolutely no evidence that hospitals generally or any particular hospital had changed their policies regarding service to the poor in response to the challenged Revenue Ruling. Here there is substantial uncontroverted evidence that providers changed their policy because, and solely because, of the Hyde Amendment.

O'Shea v. Littleton, 414 U.S. 488 and Rizzo v. Goode, 423 U.S. 362, cited in

the Government's Jurisdictional Statement are clearly distinguishable and rest upon wholly different considerations. In both cases, the Court declined to intervene on principles of federalism into the internal administration of state criminal proceedings.

Warth v. Seldin, 422 U.S. 490, cited in the Government's Jurisdictional Statement, involved a challenge to a municipal zoning ordinance. Certain individual plaintiffs failed to show any indication that in the absence of the challenged ordinance, there would have been housing in the area that was suitable to their needs at prices they could afford. The Court found that the facts alleged failed to support an actionable causal relationship between the zoning practices and the petitioners' asserted injury.

Similarly, in Linda R. S. v. Richard D., 410 U.S. 614, also cited in the Government's Jurisdictional Statement, the mother of an illegitimate child brought an action in the federal district court to enjoin the "discriminatory application" of Article 602 of the Texas Penal Code requiring child support to the parents of legitimate children only. The Court pointed out that even if the plaintiff were to succeed and Texas were to prosecute the father of her illegitimate child for non-support, there was no evidence that he would thereupon provide the desired child support. Accordingly, the Court held that the plaintiff had failed to show a direct injury as a result of the enforcement of the statute. The Court also pointed out that, as in the O'Shea and Rizzo cases cited above, it was reluctant to intervene in state criminal proceedings.

It is apparent that both in Warth v. Seldin, supra, and in Linda R. S. v. Richard D., supra, plaintiffs failed to show a direct connection between the challenged ordinance or statute and their own interests. This is in complete contrast with the present case, where the Hyde Amendment directly cuts off reimbursement for the abortions sought by the plaintiff women which the plaintiff doctors and Planned Parenthood wish to provide. The same lack of direct connection explains the holdings in California Bankers Association v. Shultz, 416 U.S. 21, 67-70, and in Civil Service Commission of New York v. Snead, 425 U.S. 457, also cited in the Government's Jurisdictional Statement.

Plaintiffs clearly meet the test established by the cases, and have shown "such a personal stake in the outcome of the controversy as to assure" concrete adverseness.

B. Section 209 of the HEW-Labor Appropriations Bill Creates an Invidious Classification Between Those Poor Women Who Choose Abortion and Those Who Choose Childbirth. The Classification Does Not Serve Any Legitimate Public Purpose, Conditions Receipt of Public Entitlements Upon the Sacrifice of Constitutionally Protected Rights and is Plainly Invalid Under the Previous Decisions of this Court.

The issue presented in this case is whether the federal government, having chosen to provide federal money for services for the treatment of pregnancy for Medicaid eligible women, may create a distinction between those women who choose to have an abortion and those who choose to carry pregnancy to term. Established equal protection principles require that whenever the government creates a classification denying or limiting benefits to one group of people while granting benefits to another group alleged to be similarly situated:

> the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. Royster Guano Co. v. Virginia, 253 U.S. 412, 415.

If the denial or limitation of benefits prevents the exercise of a constitutionally protected liberty, the classification must be supported by a compelling state interest. Shapiro v. Thompson, 394 U.S. 618, 634; Sherbert v. Verner,

374 U.S. 398, 405; Memorial Hospital v. Maricopa, 415 U.S. 250, 261-62. The "right of privacy...is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," Roe v. Wade, 410 U.S. 113, 153. See also Planned Parenthood of Central Missouri v. Danforth, US , 96 S. Ct. 2831, 2837.[6]

Under Title XIX of the Social Security Act Congress has mandated federal reimbursement for a broad range of medical services provided to eligible individuals for the treatment of pregnancy, fertility, and obstetrical and gynecological conditions. Federal reimbursement is mandated for hospital and physicians' services provided for childbirth and delivery. 42 U.S.C. 1396 et seq. Section 209 mandates one specific exception to this broad federal program of medical services for the treatment of pregnancy and fertility. It prohibits payment for abortions "except where necessary to save the life of the woman." The effect is to create two classes of pregnant women eligible for Medicaid. The first class consists of those women

6. Appellants do not dispute that "the equal protection clause of the Fourteenth Amendment is applicable to the federal government through the medium of the Fifth [Amendment]." Moreno v. United States Department of Agriculture, 345 F. Supp. 310, aff'd 413 U.S. 528, 533 N.5. See Weinberger v. Weisenfeld, 95 S. Ct. 1225, 1228, N.2. See also Bolling v. Sharpe, 347 U.S. 497; Richardson v. Belcher, 404 U.S. 81, 92 S. Ct. 254, 257; Marshall v. United States, 414 U.S. 417, 422; Jiminez v. Weinberger, 417 U.S. 628; Shapiro v. Thompson, supra at 642.

who choose to have a child. The federal government provides matching reimbursement for the costs of services provided to such women. The second class consists of those women who choose to have an abortion. Federal funds for the medical treatment of those women are prohibited.

Appellants fundamentally misstate the issue presented here. The issue is not, as they suggest (Govt. J.S. 14-15), whether Roe v. Wade requires the federal government to finance the costs of abortion, nor whether Congress was under constitutional compulsion in establishing the Medicaid program.[7] The simple fact is that Congress has chosen to provide federal funds for comprehensive medical services for the poor, including all medical services for the treatment of pregnancy, with the single exception of medical services for abortion.

The issue is not whether Congress is constitutionally mandated to finance medical services for the poor, but rather whether having comprehensively mandated such medical services, a classification which singles out women who choose abortion as a response to pregnancy can pass muster under established standards of equal protection. See

7. It is not clear whether Congress having established the Medicaid program could exclude all services related to the treatment of pregnancy from the program, or whether such an exclusion would constitute impermissible discrimination on the basis of sex. cf. Geduldig v. Aiello, 417 U.S. 484

Memorial Hospital v. Maricopa County, supra.

Appellees now apparently concede that none of the traditional reasons for restrictions on social welfare or medical benefits support the classification challenged here. They do not assert that the denial of Medicaid benefits for abortions promotes the health of persons eligible for Medicaid.[8] They do not

8. If Medicaid funds for abortion were curtailed many indigent women would not be able to obtain legal abortions (as the facts of this case demonstrate, supra 12-13). Some few will persist in their search for charitable services or borrowed money. But for these, at a minimum, delay is inevitable. The risks inherent in abortion go up quickly and dramatically as time goes by. Second trimester abortions are far more dangerous than early abortions. The risk of complications is five times greater in a second trimester abortion and the mortality rate is nine times as high as that incident to a first trimester abortion. See Harris et al., "Legal Abortion 1970-1971 - The New York Experience," 63 Am. J. of Pub. Health 409, 415 (1973); Tietze et al., "Mortality With Legal Abortion in New York City, 1970-72," 225 JAMA 507, 509 (1973).

assert that this is a measure designed to conserve limited public funds.[9] All of the evidence is that the classification denying Medicaid to poor women who choose abortion exacts appalling public and private, human and fiscal costs.

Appellants assert two justifications for this harsh discrimination against Medicaid eligible women who choose abortion: "to protect the potentiality of human life, and to avoid spending federal funds to support an activity many taxpayers feel to be morally repugnant." (Govt.

9. The average cost of abortions performed during the first trimester, as 85% of them are, is $150. Abortions performed in the second trimester cost an average of $350. H.E.W. Memorandum, "Effects of General Provision 431 of the Labor - H.E.W. Act," 120 Cong. Reg. 19, 678 (daily ed. Nov. 20, 1974). By contrast, in 1973, Medicaid paid an average of $556 for a normal delivery in a public hospital and $798 in a private voluntary hospital. Jaffe, "Short-Term Costs and Benefits of United States Family Planning Programs", Studies in Family Planning, Vol. 5, No. 3, March 1974. An HEW study submitted in opposition to the Hyde Amendment states that "for each pregnancy among Medicaid-eligible women that is brought to term it is estimated that the first-year cost to Federal, State and local assistance is approximately $2,200." Memorandum from Deputy Assistant Secretary for Population Affairs, DHEW, to House-Senate Conference Committee on Labor - HEW Appropriations Bill (H.R.14232), on Effects of Section 209, June 25, 1976.

J.S. 16.) In Roe v. Wade, 410 U.S. at 150, this Court recognized that the state does have a legitimate interest in the protection of potential human life, but it is an interest which justifies state interference with the choice of a woman and her physician only at the point of viability, 410 U.S. 163. The public interest in the protection of potential human life does not become greater simply because the women involved are poor.

That some people find abortion morally repugnant does not justify governmental discrimination against women and physicians who choose abortion. In Roe v. Wade, this Court said, "We forthwith acknowledge awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires." 410 U.S. at 116. That case makes plain that the fact that some people are strongly opposed to abortion is simply not sufficient reason to penalize the actions of women and physicians who choose abortion. With respect to poor women, denying Medicaid is a penalty as severe and effective as the criminal sanction is in relationship to the well-to-do. As this Court recognized in Singleton v. Wulff, supra, 49 L. Ed. 2d at 837:

> For a doctor who cannot afford to work for nothing, and a woman who cannot afford to pay him, the State's refusal to fund an abortion is as effective an "interdiction" of it as would ever be necessary. Furthermore, since the right asserted in

> this case is not simply the right to have an abortion, but the right to have abortions nondiscriminatorily funded, the denial of such funding is as complete an "interdiction" of the exercise of the right as could ever exist.

Moral feelings of a segment of the population do not provide rational support for a classification which does not reasonably further any other legitimate public purpose. Certainly these moral feelings do not provide the strong justification which the Court's decision in Roe v. Wade requires of governmental action which penalizes and deters women and physicians from seeking abortions in the first two trimesters of pregnancy.

The record in this case establishes that the entire purpose of the Hyde Amendment is to inhibit and deter poor women eligible for Medicaid from obtaining abortions. The record also establishes that during the brief period prior to the implementation of the order of the court below, this was precisely the Amendment's effect. Physicians and clinics turned away women seeking abortions. Some women sought prenatal care, while others obtained illegal "kitchen table" abortions. The right of a woman to choose, in consultation with her physician, whether to have an abortion is an aspect of the constitutionally protected right to privacy. Roe v. Wade, supra, at 153. It is now long established that "conditions on public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter," the exercise of

constitutionally protected liberties. Sherbert v. Verner, supra at 405.

Similar issues are now before this Court in Maher v. Roe, No. 75-1440, argued Jan. 11, 1977. The Government suggests that this case should be held pending disposition of that one. Govt. J.S. 20. We do not disagree with this suggestion. However, we do disagree with their characterization of the differences between the Connecticut law and the federal restriction challenged here.[10] Connecticut refuses to pay for abortions except where they are necessary to preserve the life or health of the mother, while the federal restriction prohibits payment except where the abortion is necessary to preserve the life of the

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10. The government's definitions of "elective" and "therapeutic" abortions are incomprehensible, elusive, and change from case to case. Contrast Govt. J.S., footnotes 2 and 5, with each other and with the Briefs Amicus Curiae of the Solicitor General filed in Commissioner of Social Services v. Klein, No. 72-770, vacated and remanded 412 U.S. 925, appeal pending sub nom Toia v. Klein, No. 75-1749, and in Beal v. Doe, No. 75-554, cert. granted 96 S. Ct. 3220. These conflicting linguistic permutations illustrate the difficulties facing a physician required to certify that an abortion is "therapeutic," not "elective," or "medically necessary" as the case may be under various state laws and the glosses placed on those laws by lawyers seeking to justify restrictions on Medicaid payments to physicians providing abortions to poor women.

mother. If this Court finds that the Connecticut classification invidiously discriminates against poor women who choose abortion as opposed to childbirth, then the more restrictive federal limitation is invalid a fortiori. The judgment of the district court in the instant case should therefore be summarily affirmed. If, on the other hand, the Connecticut restriction is upheld because of the latitude allegedly granted to women and their physicians in determining when an abortion is needed to preserve the health of the woman, then probable jurisdiction could be noted in the present case to determine whether the more restrictive federal classification eliminating Medicaid entitlement except where the life of the mother is in danger serves a legitimate Congressional purpose.

III. THE CLAIMS OF THE INTERVENORS SHOULD BE SUMMARILY DISMISSED BECAUSE THEY FAILED TO PROPERLY PERFECT THEIR APPEAL TO THIS COURT, THEY LACK STANDING, AND THE ONLY ADDITIONAL CLAIM THEY RAISE IS PLAINLY FRIVOLOUS.

Intervenors have not perfected the appeal of this case to this Court. Supreme Court Rules and federal statutes are clear and mandatory: to appeal to this Court, a notice of appeal must be filed and it must be filed on time. Rule 10(1) of the Supreme Court Rules provides that an appeal is "taken" only by filing a notice of appeal; Rule 10(3) requires that a party appealing from the ruling of a federal court file the notice with the clerk of the court from which the appeal is taken; and 28 U.S.C. §2101 requires that an appeal in an action of this nature be taken within thirty days. This Court has repeatedly held that failure to file a timely notice of appeal requires dismissal. Taggart v. New York, 392 U.S. 667 and Territo v. United States, 358 U.S. 279.

Although over four months have passed since the district court rendered its decision, Intervenors have yet to take an appeal in compliance with these rules. Their only gesture towards compliance was the filing of a defective notice addressed to this Court rather than the district court as required by Rule 10(3). (Int. J.S. 1a-4a). Notifying the Supreme Court of the intention to appeal fails as an attempt to take an appeal. Credit Co. v. N. Arkansas Central R. Co., 128 U.S. 258. This Court has held that "An appeal cannot be said to be 'taken' ... until it is, in some way, presented to the

court which made the decree appealed from, thereby putting an end to its jurisdiction ... " Credit Co. v. N. Arkansas Central R. Co., 128 U.S. 258. Accord, Old Nicks Williams Co. v. United States, 215 U.S. 541. In short, Intervenors have never taken an appeal.

Intervenors offer no explanation and no excuse for their failure to comply with the rules of this Court. Intervenors were given notice of their failure to file an effective notice of appeal before the time to file a notice had passed. The defendant Secretary of Health, Education and Welfare, in his brief in opposition to the stay requested by Intervenors, stated, "It appears that [Intervenors] mistakenly have filed their notice of appeal in this Court rather than in the district court. See Rule 10(3) of the Rules of this Court." Memorandum for the Secretary of Health, Education and Welfare in Opposition to the Application for a Stay Pending Appeal at 4, N. 6. Yet, in spite of this clear warning, complete with citation, Intervenors never did file the mandatory notice. Intervenors' actions approach willful disregard for Court rules.

Discussing the importance of following the rules set for the conduct of Supreme Court business, this Court has said:

> To the proper conduct of the business of this court rules are necessary, and, having been prescribed, reasonable compliance with them is expected and must be insisted upon. When they are disregarded, dispensation from the consequences can

> only be extended where the circumstances furnish adequate excuse. Were this otherwise, our regulations might become more honored in the breach than the observance, and the recognition of due procedure would be seriously weakened and impaired. Green v. Elbert, 137 U.S. 615.

In light of Intervenors' complete, persistent, and unexplained disregard for the Supreme Court Rules and procedures, the attempted appeal in this action should be dismissed.

The attempted appeal of Intervenor Isabella Pernicone is deficient and must be dismissed for a second reason and that is that she has no standing before this Court. Her sole claim to standing rests not on injury to herself but rather injury to the class of embryos and fetuses which she purports to represent as guardian ad litem. (Int. J.S. 21a). However, since this Court has consistently rejected claims that embryos or fetuses be treated as "persons" with legal rights, embryos and fetuses have no standing or cognizable legal interest and no ability to confer such on others acting on their behalf.

This Court specifically addressed itself to the question of the legal status of embryos and fetuses in Roe v. Wade, 410 U.S. 113. "[T]he word 'persons,'" the Court said, "as used in the Fourteenth Amendment, does not include the unborn. " 410 U.S. at 158. Explaining its position, this Court said the law "has been reluctant to ... accord legal rights to the unborn except in narrowly defined situations and except when the

rights are contingent on live birth." 410 U.S. at 161.

Affirming this conclusion, this Court has refused to hear appeals brought by guardians ad litem purporting, like Intervenor Pernicone, to represent the interests of embryos and fetuses. In Ryan v. Klein, 412 U.S. 924, a case involving a challenge to New York State's restrictions on Medicaid payments for abortions, this Court dismissed as insubstantial the claims presented by a similar guardian intervenor. See also, Byrn v. New York City Health and Hospitals Corp., 410 U.S. 949, dismissing appeal from 31 N.Y.2d 194. This Court should follow its rulings in Byrn and Ryan and dismiss this purported guardian's appeal.

Finally, the Intervenors' attempted appeal should be dismissed because they raise no federal question of sufficient substance to warrant exercise of the appellate jurisdiction of the Supreme Court. Intervenors make only one argument in addition to those raised by the Government. This argument, like those raised by Appellants, see Point I, supra, fails to raise a substantial federal question. Intervenors argue that the district court, by examining the constitutionality of the Hyde Amendment, has usurped the power, granted to Congress by Art. I §9 clause 7 of the Constitution, to appropriate funds. Intervenors assert that any measure, provision, or amendment Congress attaches to any appropriations bill is immune from all judicial scrutiny.

This argument was considered by the Supreme Court thirty years ago and was

firmly and unanimously rejected. In United States v. Lovett, 328 U.S. 303, the argument was made that actions of Congress pursuant to its power to appropriate funds are "plenary and not subject to judicial review," 328 U.S. at 307. This, the Court said, is simply not so. Appropriations bills, like other legislative and executive actions, must be subject to review by courts in order to preserve the values of a limited constitution, 328 U.S. at 314. Quoting Alexander Hamilton, Mr. Justice Black declared that the duty of courts of justice "must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservation of particular rights or privileges would amount to nothing." 328 U.S. at 314. This unanimous Supreme Court opinion leaves no doubt that amendments to appropriations bills, like other acts of Congress, are subject to judicial scrutiny.

Although Intervenors attempt to distinguish United States v. Lovett from this case, the argument they make is the same as that made in Lovett and it fails for the same reasons. In both cases citizens claimed that Congress had passed a law which denied them constitutionally guaranteed rights. In Lovett, citizens claimed Congressional action denied them their right to freedom from the oppressive bills of attainder outlawed by the Constitution. Here, citizens claim Congressional action has denied them their right to the equal protection of the laws guaranteed by the Fifth Amendment to the Constitution. In both cases Congressional action took the form of an amendment to an appropriations bill. In neither case does the formal technique

used to implement the will of Congress place the action beyond the reach of the courts' power to review the constitutionality of legislative actions.

CONCLUSION

Since there is no jurisdictional basis for a direct appeal to this Court, the appeal should be dismissed. Even if this Court did have jurisdiction, Appellants present no federal question of sufficient substance to warrant review by this Court and thus the ruling of the district court should be affirmed. In addition, the purported appeal of Intervenors should be dismissed because Intervenors have never perfected an appeal to this Court.

Respectfully submitted,

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March 3, 1977